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No. 04-702

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF GENERAL DAVID M. BRAHMS (ret.), ADMIRAL LEE F. GUNN (ret.), ADMIRAL JOHN D. HUTSON (ret.), AND GENERAL RICHARD O'MEARA (ret.) IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

Amici are retired senior military officials with extensive experience in legal policy, the laws of war, and armed conflict. Amici have spent their careers leading troops at home and overseas and protecting the nation from attack. Amici believe the United States imperils its own soldiers, and undermines the very concept of laws of war, if it does not honor its obligations under the Geneva Conventions and afford all individuals seized in armed conflicts the Conventions' historic protections.

Brigadier General David M. Brahms served in the United States Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. He served as principal legal advisor for POW matters at Marine Corps Headquarters in the 1970s and was directly involved in issues relating to the return of American POWs from Vietnam. From 1985 through 1988, he was the senior legal adviser for the Marine Corps. General Brahms is a member of the Board of Directors of the Judge Advocates Association.

Vice Admiral Lee F. Gunn served in the United States Navy for 35 years. From 1997 to 2000, he was the Navy's Inspector General. Admiral Gunn commanded the USS Barbey, Destroyer Squadron Thirty-One, and Amphibious Group Three, comprised of the 21 ships, 12 shore commands, and 15,000 Sailors and Marines of the Pacific Amphibious Forces. He also served under General Anthony Zinni as Deputy Combined Forces Commander and Naval Forces Commander for Operation United Shield,

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

the final withdrawal of United Nations peacekeeping forces from Somalia in 1995.

Rear Admiral John D. Hutson served in the United States Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson is now President and Dean of the Franklin Pierce Law Center in New Hampshire.

Brigadier General Richard O'Meara retired from the Army after thirty-six years of service in the active and reserve components. He is a combat veteran and former Assistant to the Judge Advocate General for Operations (IMA). He is a professor of International Relations at Monmouth University in New Jersey and serves as adjunct faculty in the Defense Institute for International Legal Studies. General O'Meara has lectured on human rights and the rule of law in such diverse venues as Cambodia, Rwanda, and the Ukraine, and serves as a defense expert before the Special Court in Sierra Leone.

STATEMENT

Petitioner claims he is a prisoner of war and seeks habeas relief from trial before a military commission that fails to afford him due process rights and other protections to which he is entitled under the Geneva Conventions. The Geneva Conventions protect POWs from retaliation by their captors by requiring that in any criminal proceeding, they be granted the same protections as would a soldier of the captor state. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, art. 102, 6 U.S.T. 3316, 74 U.N.T.S. 135. The military commissions established by the President to try Petitioner fall short of this requirement.

Respondents seek to upend a half-century of international human-rights law in insisting that the Geneva

Conventions are not binding domestic law, and by asserting an unreviewable right to declare the Conventions inapplicable to a given conflict – in this instance, the invasion of Afghanistan and the campaign against Al Qaeda. See Motion for Expedited Review, filed Nov. 16, 2004, *Hamdan* v. *Rumsfeld*, Civ. Action No. 04-CV-1519. Respondents further assert unreviewable power in the application of the laws of war to the detainees held at Guantanamo Bay and to the war on terrorism generally.

Respondents' denial of Hamdan's rights under the Geneva Conventions directly endangers the American soldiers. As the Legal Adviser has stated:

> Any small benefit from reducing further [the application of the Geneva Conventions] will be purchased at the expense of the men and women in our armed forces that we send into combat. A decision that the Conventions do not apply to the conflict in Afghanistan in which our armed forces are engaged deprives our troops there of any claim to the protection of the Convention in the event they are captured and weakens the protections afforded by the Conventions to our troops in future conflicts.

Memorandum from William H. Taft IV, Legal Adviser, Dep't of State, to Counsel to the President (Feb. 2, 2002), *available at* http://www.fas.org/sgp/othergov/taft.pdf. Senator Biden has made the same point more bluntly: "There's a reason why we sign these treaties: to protect my son in the military. That's why we have these treaties. So when Americans are captured, they are not tortured." See http://biden.senate.gov/presapp/record.cfm?id=22640 (June 13, 2004) (last visited Sept. 29, 2004). Respondents' denial of Petitioner's rights under the Geneva Conventions also sets an alarming example for other governments, which have already begun citing United States policy to justify their own repressive policies.

The Geneva Conventions establish rules for the treatment of citizens of signatory nations captured during war. The United States became a party to the Conventions to protect the safety and welfare of its own citizens. As Secretary of State Dulles stated during Senate consideration of the Conventions, America's "participation [in the Conventions] is needed to * * * enable us to invoke them for the protection of our nationals." *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong., 1st Sess. 3-4 (1955). Senator Mansfield similarly urged that "it is to the interest of the United States that the principles of these conventions be accepted universally by all nations," for "[t]he conventions point the way to other governments." He stated:

> Without any real cost to us, acceptance of the standards provided for prisoners of war, civilians, and wounded and sick will insure improvement of the condition of our own people as compared with what had been their previous treatment.

101 Cong. Rec. 9960 (1955). Senator Alexander Smith voiced the same view: "I cannot emphasize too strongly that the one nation which stands to benefit the most from these four conventions is the United States * * *. To the extent that we can obtain a worldwide acceptance of the high standards in the conventions, to that extent will we have assured our own people of greater protection and more civilized treatment." *Id.* at 9962.

The United States has been steadfast in applying the Conventions – even as to soldiers of governments that insisted the Conventions did not bind them, and even where the Conventions technically did not apply. Time and again the United States' adherence to the Conventions and its precursors has saved American lives.

In World War II, for example, it has been noted that "[t]he American Red Cross attributed the fact of the survival of 99 percent of the American prisoners of war held by Germany * * * to compliance with the [1929] Convention." Howard S. Levie, *Prisoners of War in International Armed Conflict* 10 n.44 (1977). And the fact that millions of POWs from all camps returned home was "due exclusively to the observance of the Geneva Prisoners of War Convention." Josef L. Kunz, *The Chaotic Status of the Laws of War and the Urgent Need for Their Revision*, 45 Am. J. Int'l L. 37, 45 (1951). The significantly higher mortality rate suffered by Soviet soldiers held by Germany can be explained by the fact that the 1929 Convention was not "technically applicable" and was not applied to those prisoners. Levie, *Prisoners of War in International Armed Conflict* at 10 n.44.

Thousands of American soldiers taken prisoner during the Vietnam War also benefited from the United States' commitment to the Geneva Conventions. Although North Vietnam insisted that the Geneva Conventions did not apply to American prisoners, whom it labeled "war criminals," the United States afforded all enemy POWs the protections of the Conventions to secure "reciprocal benefits for American captives." Maj. Gen. George S. Prugh, *Vietnam Studies, Law at War: Vietnam 1964-73*, at 63 (1975). The United States afforded those protections not only to North Vietnamese soldiers but also to the Viet-Cong, who did not follow the "laws of war." *Id.*; See also Dep't of State Bull. 10 (Jan. 4, 1971) (White House statement announcing President Nixon's demand that the North Vietnamese apply the Geneva Conventions to ease "the plight of American prisoners of war in North Viet-Nam").

These efforts paid off. Former American POWs and commentators have recognized that the United States'

application of the Conventions to North Vietnamese soldiers and Viet-Cong saved American soldiers from abuses when they were imprisoned in Vietnam. Speaking on the fiftieth anniversary of the Geneva Conventions, Senator McCain stated:

> The Geneva Conventions and the Red Cross were created in response to the stark recognition of the true horrors of unbounded war. And I thank God for that. I am thankful for those of us whose dignity, health and lives have been protected by the Conventions * * *. I am certain we all would have been a lot worse off if there had not been the Geneva Conventions around which an international consensus formed about some very basic standards of decency that should apply even amid the cruel excesses of war.

Senator John McCain, Speech to the American Red Cross Promise of Humanity Conference (May 6, 1999), *available at* http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=820 (last visited Sept. 29, 2004). Senator McCain stated that he and other POWs are grateful to have been "spare[d] * * * the indignity of [being] put on trial in violation of the conventions." *Id.*

Since the Vietnam War, the United States has continued to insist on broad adherence to the Geneva Conventions. The emergent features of modern conflict – including peacekeeping operations and police actions against warlords and terrorist networks – have not diminished the importance to the United States of adhering to the Geneva Conventions.

For example, following the capture of U.S. Warrant Officer Michael Durant in 1993 by forces loyal to Somali warlord Mohamed Farah Aideed, the United States de-

manded assurances that Durant's treatment would be consistent with the protections afforded by the Conventions. The United States made this demand even though, "[u]nder a strict interpretation of the Third Geneva Convention's applicability, Durant's captors would not be bound to follow the convention because they were not a 'state.'" Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror"*, 44 Harv. Int'l L.J. 301, 310 (2003).

As part of its negotiations on behalf of Durant, the United States stressed that Somali fighters captured by the United States would be treated as prisoners of war under the Geneva Conventions, even though Somalia had no functioning government and thus was not a "state" within the meaning of the Geneva Conventions. *See* Paul Lewis, *U.N., Urged by U.S., Refuses to Exchange Somalis*, N.Y. Times, Oct. 8, 1993, at A16. This approach bore fruit: "Following these declarations by the United States, heavy-handed interrogations of Durant appeared to cease, the Red Cross was allowed to visit him and observe his treatment, and he was subsequently released." *McDonald & Sullivan*, 44 Harv. Int'l L.J. at 310.

Denying Guantanamo detainees the protections of the Geneva Conventions weakens the United States' ability to demand that the Conventions be applied to Americans captured during armed conflicts abroad. That Respondents believe they can justify denying the detainees those protections is cold comfort:

> Interpolating unrecognized exceptions into the contours of prisoner of war status * * * undermines the Geneva Conventions as a whole, [and could easily] boomerang to haunt U.S. or allied forces: enemy forces that might detain U.S. or allied troops would undoubtedly follow the U.S. lead and devise equally

> creative reasons for denying prisoner of war status. By [flouting] international law at home, the United States risks undermining its own authority to demand implementation of international law abroad.

Manooher Mofidi & Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 Cornell Int'l L.J. 59, 90 (2003).

Such erosion is already occurring. Alarmingly, but predictably, other governments have begun citing United States policy to justify their repressive policies:

Egypt. President Mubarak stated that Sept. 11 "created a new concept of democracy * * * especially in regard to the freedom of the individual."

Liberia. President Taylor imprisoned and tortured a respected journalist, labeling him an "unlawful combatant."

Zimbabwe. A spokesman for President Mugabe called for full investigation and prosecution of "media terrorism."

Eritrea. The government suspended independent newspapers and jailed 21 journalists and opposition politicians, citing links with Osama Bin Laden.

China. The government applied a new terrorism charge against a U.S. permanent resident and democracy activist.

Russia. The government linked its brutal tactics in Chechnya to Sept. 11.

Lawyers' Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States*, at 77-79 (Fiona Doherty & Deborah Pearlstein eds., 2003).

ARGUMENT

Certiorari before judgment is appropriate on a showing that a case "is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination" by the Court. Sup. Ct. R. 11. Few cases are of more "imperative public importance" than those involving the reach of presidential power during wartime and the obligations of the United States to its captives under international law. The need for swift and definitive resolution of the questions presented by Respondents' denial of Petitioner's rights under the Geneva Conventions justifies "deviation from normal appellate practice" and requires "immediate determination" by the Court.

I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF IMMEDIATE CONSEQUENCE.

A. The Safety of Overseas Military Personnel Depends on Compliance by the United States with the Geneva Conventions.

For decades, the Geneva Conventions have stood as a symbol of civilized order and a bulwark against the excesses and cruelties of war. Respondents' refusal to apply these Conventions with respect to the detainees held at Guantanamo Bay imperils American soldiers. As long as Respondents refuse to afford the Guantanamo detainees the Conventions' protections, others will be tempted to follow suit, with potentially fatal consequences for the men and women of our Armed Forces and other Americans captured in armed conflicts abroad. As Judge Robertson stated, the position asserted by Respondents here "can only weaken the United States' own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad." Mem. 21.

The questions presented by the petition are ones the Court has previously deemed suitable for resolution before judgment by the Courts of Appeal. In *Kinsella* v. *Krueger*, 351 U.S. 470 (1956), the Court granted certiorari before judgment to review a district court's denial of habeas for a soldier tried and sentenced under the Uniform Code of Military Justice, 47 U.S.C. 801 *et seq*. In *Wilson* v. *Girard*, 354 U.S. 524 (1957), the Court directly reviewed a district court's judgment of whether a U.S. soldier accused of the shooting death of a Japanese civilian should be tried in the courts of Japan.

In *Kinsella*, moreover, the party seeking review – the Government – had prevailed in the district court, just as Petitioner has prevailed below in this case; but the Court granted certiorari before judgment "because of the serious constitutional question presented and its far-reaching importance to our Armed Forces stationed in some sixty-three different countries throughout the world." 351 U.S. at 473. Respondents' decision to appeal the District Court's decision keeps alive the uncertainty regarding the United States' commitment to meeting its treaty obligations, including obligations on which the safety of American soldiers depends, and encourages other nations to consider themselves free to disregard international law.

B. The President's Refusal To Apply the Geneva Conventions to Petitioner Is an Abuse of Presidential Power.

Certiorari before judgment is also appropriate here because the questions presented have immediate consequences for the exercise of presidential power in wartime. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). Such review is particularly warranted where, as here, the President claims unreviewable power to decide whether and when the United States will honor its treaty obligations – to decide, in short, whether and when

he will obey "the supreme Law of the Land." U.S. Const. art. VI, § 3. Cf. *United States* v. *Nixon*, 418 U.S. 683 (1974).

C. The Standing of the United States Abroad and the Vitality of International Law Depend on Compliance with the Geneva Conventions.

Certiorari before judgment is also warranted by the immediate importance of this case to the standing of the United States abroad and the vitality of international law. Respondents' refusal to afford the detainees, nationals of 40 different countries, the protections of the Geneva Conventions has alarmed even our closest allies. In an amicus brief filed in the District Court, 271 members of the Parliaments of the United Kingdom and the European Community stated their view "that aspects of the military commission system put the United States in breach of its international law obligations, a situation [those amici] consider to be deeply regrettable." Amicus Br. of 271 United Kingdom and European Parliamentarians, filed Sept. 29, 2004, *Hamdan* v. *Rumsfeld*, *supra*, at 2. Prime Minister Tony Blair himself has reportedly stated that his government was "pressing Washington behind the scenes to ensure the planned trials of terrorism suspects jailed at Guantanamo Bay do not violate international law." *UK Presses US over Guantanamo Bay Trial*, Daily Times (Oct. 7, 2003), *available at* http://www.dailytimes.com.pk/default.asp?page=story_10-7-2003_pg7_53 (last visited Nov. 17, 2004).

The Court has previously granted certiorari before judgment where the United States was in danger of breaching its international obligations or its actions were otherwise subject to international criticism. In *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), the Court granted certiorari before judgment in a case involving the Government's release of attachments on Iranian assets. The

Court bypassed the Court of Appeals in part because "Iran could consider the United States to be in breach of the Executive Agreement [implementing a negotiated resolution to the Iran hostage crises]." *Id.* at 660. In *McCulloch* v. *Sociedad*, 372 U.S. 10 (1963), the Court granted review of a district court's judgment that the NLRB had jurisdiction to hold a union election aboard a ship registered and owned by Honduras, and staffed by foreign seamen. "[T]he Board's assertion of power * * * has aroused vigorous protests from foreign governments and created international problems for our Government * * *. [T]he presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy." *Id.* at 17. And in *Ex Parte Peru*, 318 U.S. 578 (1943), the Court granted certiorari before judgment in a case involving a district court's assertion of in rem jurisdiction over a ship owned by Peru. "[W]e think that * * * the case is one of such public importance and exceptional character as to call for the exercise of our discretion to issue the writ rather than to relegate the Republic of Peru to the circuit court of appeals, from which it might be necessary to bring the case to this Court again by certiorari." *Id.* at 586. See also *Wilson*, 354 U.S. 524, granting certiorari before judgment in a case involving interpretation of an agreement with Japan, and concerning whether a U.S. soldier should be tried in Japanese courts.

D. After Enduring Three Years of Captivity, Petitioner Is Entitled to Swift and Final Resolution of the Case.

Although the legal landscape has changed in the past half-century, the questions presented in this case are no less urgent than those the Court in *Ex Parte Quirin*, 317 U.S. 1 (1942). In *Quirin*, this Court was asked to consider

whether German saboteurs captured on U.S. soil could be lawfully tried by a military commission. *Id.* at 18-19. Recognizing the importance of this question to civil liberty, the Court convened a special Term of the Court and considered petitioner's habeas claims without waiting for judgment from a Court of Appeals. The Court explained:

> In view of the public importance of the questions raised by these petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court, convened on July 29, 1942 * * *. We grant certiorari before judgment for the reasons which moved us to convene a special term of Court.

Id. at 19.

The same justifications apply with even greater force here. In *Quirin*, the petitioners were held in United States custody for less than two months before this Court issued a decision on their appeal. Petitioner, by contrast, has already spent nearly three years "detained" at Guantanamo. During much of that time, he was held in solitary confinement with limited access to sunlight and limited opportunities for physical exercise. His psychological and physical health reportedly has deteriorated significantly. For this additional human reason, certiorari before judgment is warranted in this case.

II. THE EXPEDITED SCHEDULE SET FOR THE APPEAL DOES NOT OBVIATE THE NEED FOR CERTIORARI BEFORE JUDGMENT.

Amici are advised the Court is likely to fill its calendar for the Term at its January conferences. Under the schedule established by the Court of Appeals, however, this case will not be fully briefed until January 10, 2005, and oral argument has not been scheduled. Unless the Court grants certiorari before judgment, it would likely require other extraordinary action, see, e.g., *McConnell* v. *FEC*, No. 02-1674; *United States* v. *Fanfan*, No. 04-105, to issue an early decision. The vitality of the Geneva Conventions would remain in doubt until the following term.

CONCLUSION

For the reasons stated, the petition for certiorari before judgment should be granted.

Respectfully,

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